The effective date in the matter before us would accordingly be July 22, 1976 and the appellant's proof of debt was therefore wrongly rejected by the respondent.

We accordingly at the conclusion of argument before us allowed the appeal with costs here and below, set aside the order of the learned Judge, made an order in terms of the appellant's motion of May 10, 1982 that its proof of debt be admitted and directed the deposit in court to be paid out to the appellant.

Appeal allowed.

Solicitors: *Zain & Co.*

TARA RAJARATNAM v. DATUK JAGINDAR SINGH & ORS.

[O.C.J. (Abdul Razak J.) November 21, 1982]
[Johore Bahru – Civil Suit No. 284 of 1979]

Damages – Breach of contract, undue influence, breach of trust and fraud – Measure of damages – Joint and several liability of defendants – Contracts Act, 1950, ss. 74(1) & 183.

Fraud – Damages – Restitution of land no longer possible.

In this case the learned trial judge had found the first and second defendants liable for breach of contract, undue influence, breach of trust and fraud. The third defendant was found to be liable for fraud only in conjunction with the first and second defendants – see [1983] 2 M.L.J. 127. The learned trial judge dealt with the question of damages in a separate judgment. An appeal from this judgment was dismissed by the Federal Court – see [1983] 2 M.L.J. 196.

Held: (1) there could be no restitution of the land to the plaintiff as the said land was no longer in the hands of the defendant and therefore only damages could be awarded instead;

(2) in contract, the measure of damages is the market value of the benefit which the plaintiff had been deprived through the breach. In fraud the measure of damages is an award which serves to put the plaintiff in the position he would have been if the representation had not been made to him;

(3) in this case it is sufficient for the purpose of awarding the damages to consider them only on the basis of fraud because the award could be the highest attainable and would necessarily cover the claims for breach of contract and breach of trust as well;

(4) taking into account the value of the land in July 1975 and allowing for the increase in the price of the land from July 1975 to July 1982, the date of the judgment and the value of the house, the damages would be awarded in the sum of $972,624.00;

(5) in the circumstances the plaintiff's claim for exemplary damages would be disallowed;

(6) as the monies paid as consideration for the purchase of the said land were paid pursuant to and arising out of fraud they are not recoverable and credit could not be given for them;

(7) the second defendant had never disclosed that he was acting for the first defendant, his principal and under section 183 of the Contracts Act, he is in the event presumed to be personally liable on the contract;

(8) the first defendant was present when the second defendant acted as his agent to commit fraud on the plaintiff which thus makes him liable jointly with the second defendant;

(9) the first, second and third defendants were jointly and severally liable for the tort of deceit, but the first and second defendants were jointly and severally liable for breach of contract. Judgment would therefore be given for the sum of $973,000 as general damages to the plaintiff, with costs and interest.

[*Editorial Note:* The defendants appealed from the decision of the Federal Court to the Privy Council on both liability and quantum. The appeal is pending.]

Cases referred to:

(1) *Doyle* v. *Olby* [1969] 2 Q.B. 158.
(2) *Pribu* v. *The Secretary of State* 135 I.C. 183.
(3) *Palaniappa Chettiar* v. *Arunasalam Chettiar* [1962] A.C. 294; [1962] M.L.J. 143.
(4) *Broome* v. *Cassell & Co* [1972] A.C. 1027, 1076.
(5) *Mafo* v. *Adams* [1969] 3 All E.R. 1404, C.A.
(6) *Rookes* v. *Barnard* [1964] A.C. 1129.
(7) *Drane* v. *Evangelou & Ors.* [1978] 1 W.L.R. 455.
(8) *Barber* v. *Pigden* [1937] 1 K.B. 664.

CIVIL SUIT.

H.E. Cashin (*Subra Naicker* with him) for the plaintiff.

Chin Yew Meng for the 1st and 2nd defendants.

Ronald Khoo for the 3rd defendant.

Cur. Adv. Vult.

Abdul Razak J.: I shall now deal with the question of damages. The plaintiff's claim is as already stated for breach of contract, undue influence, breach of trust and fraud. In my judgment I had found the 1st. and 2nd. defendants in breach in respect of each separate cause of action. The 3rd. defendant was found to be liable for fraud only in conjunction with the 1st. and the 2nd. defendants. In so far as the claim for undue influence and breach of trust were concerned the remedy is in equity for restitution if the subject matter was still *in specie* or for an account of the proceeds from its disposal. There is no doubt that the subject property in its original state had ceased to exist since it

had been subdivided and transferred to third parties. It follows the remedy of restitution cannot lie. Indeed the plaintiff had abandoned the claim for account of any profits derived. There is a claim however for exemplary damages.

Let us deal with the measure of damages in respect of each claim. The object of an award is to give the plaintiff compensation for the damage, loss or injury he had suffered. The loss may be pecuniary or non-pecuniary. In the latter the damages are not compensation for loss and the damages may be nominal or exemplary.

In contract, the measure of damages is the market value of the benefit which the plaintiff had been deprived through the breach. The plaintiff in other words is entitled to loss of his bargain. The object is to put the plaintiff in the position as if the contract had been performed (*Mcgregor on Contract* 13th. Edition, Page 21). The common law position had been restated by statute. Section 74(1) of the Contracts Act says:—

"When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it."

In fraud, the measure of damages is an award which serves to put the plaintiff in the position he would have been in, if the representation had not been made to him. *(Mcgregor Page 907). Salmond On Tort (17th. Edition Page 531)* on the other hand says it is to put the person whose rights have been invaded in the same position as if they had been respected. The net result in both, I think, is the same. In other words if the plaintiff is induced by fraud to conclude a contract, he is not entitled as he is in contract to recover in deceit for the loss of the bargain. *(Mcgregor, Page 907, Para 1357).* There has been some doubt however regarding whether the contractual or tortious measure should apply in the tort of deceit; seemingly it was resolved in *Doyle* v. *Olby*[1] that the tortious measure would apply. The normal practice in deceit is as stated by *Mcgregor* to value the property or services transferred less the value received, at the time of the transfer. *(Page 913).* The plaintiff's claim was for general damages. There was no claim for special damages. If there was any value of the land pleaded, one must necessarily conclude therefore this was merely intended to emphasise that it had great value to both the plaintiff and the defendants. The actual value of the property at the time when the wrong was committed and at the date of judgment however will be relevant, as will be seen later, to determine the plaintiff's loss.

I think it is sufficient for the purpose of awarding the damages for me to consider them only on the basis of fraud because in my view the award would be the highest attainable and would necessarily cover the claim for the breach of contract and trust as well. It seems agreed, and it must be so, that the measure of damages shall be determined as at the date of the transfer of the land from the plaintiff to the defendant, that is July 1975. That was the time of the wrong. The loss was the loss of the land itself which by the fraud of the defendant, the plaintiff had been deprived of and the plaintiff must thus be given the value of the property which she had lost. But to that value must be added the changes in its value in the intervening period, and the earliest time the action should have reasonably been brought to judgment. *(Mcgregor Page 334).*

What was therefore the value of the land in July 1975? Both sides called their valuers to give evidence on the value of the land in July 1975. D.W.4 said he was asked by the defendant to say whether the value at $220,000/- was reasonable in 1974 and 1975. It seems to me rather strange though why the valuer had not been asked to give the market value, where it would have implied giving a fair value to both the plaintiff and the defendant. The 1st., 2nd. and 3rd. defendants cannot say they did not know. They were lawyers. Perhaps they were afraid that the market value would be unfavourable to them. I cannot find any other explanation. True to his brief, D.W.4 said that the price was reasonable; it does not necessarily follow, however, that he was saying that it was reasonable to the plaintiff. This argument is quite significant because if the plaintiff is to be put in the position as if the contract had not been performed, which is the underlying principle, then the reasonableness, if at all, should have been construed more in favour of the plaintiff than the defendant since, if she had known what the defendant was going to do, she could not conceivably have transferred the land to the defendant in the first place. She would not have lost it and she would not find herself now in the position where she could only get the value for it whether she liked it or not. The question of reasonableness particularly comes into focus when the issue arises

whether she should be compensated for her house, which will be discussed later.

The subject property was valued by the Valuation Department for stamp duty in connection with the transfer from the plaintiff to the defendant at $220,000/-. D.W.4 approved the valuation. He said he knew the consideration to be $220,000/- when he made his report. It would seem to me however that his task would have been easier if he had not made the earlier valuation. It would have been easier still, I feel, if he had been asked to value it on the basis of the proper market value, not on whether it was reasonable. In his report he considered the value of the land around the locality between the period 1973 – 1977. He took into account the development trend in the Kulai area where he said "Newer housing estates were being attracted to the north-west, that is along those parts of Kulai Besar near the 19½ m.s. and Kulai Baru at the 21st. m.s. of Johor Bahru-Kulai Road and north-east along the Kulai-Kota Tinggi Road." He was of the view that property value had reached its peak around the end of 1973 and early 1974 with the property providing for general stabilization thereafter. He therefore considered that the value of the property in July 1975 which was the date of transfer was no different from the value of property on March 30, 1974 the date of the Agreement, P.30. He valued the property therefore at $44,000/- per acre. He did not take into account the house standing on the land because he valued the property "not on the basis of agricultural user but on the basis of a more intensive use in keeping with neighbourhood development." The house was thus assumed to be demolished.

I should like to make these observations however of D.W.4's evidence of sales. Lots 6021 and 6022 which were about the nearest to the subject lot being two lots away were not strictly market value transactions because they were transfers for love and affection. The collector valued the land for the purpose of stamp duty at $27,000/- per acre in August 1975 for Lot 6022 and $37,000/- per acre for Lot 6021 in April 1976. There is further no evidence that the valuation had been referred to the Valuation Department for their approval. There were times before when valuations were done by the collectors themselves. Three particular lots were singled out by D.W.4 – Lot 6602, was transacted at $24,300/- per acre in November 1973, with Lot 6603. Lot 6604 was transacted at $30,300 per acre in November 1973. They were as can be seen transacted at the same time. Lot 1252 was valued by the Government at $32,000/- per acre in January 1977. Except for Lot 6604 the Government had increased the land value in all the three lots. Lots 6602 and 6603 were increased from $17,000/- to $24,300/- per acre an increase of 43%. (D.19A Vol. 3). The Government had not increased the value in respect of Lot 6604 which remained at $30,300/- per acre. But there had been an increase in the same month over lands adjoining one another and enjoying the same characteristics from $17,000/- per acre in Lots 6602 and 6603 to $30,000/- per acre in Lot 6604, an increase of well over 76%. In another adjoining Lot 1252 the value had been increased by the Government from $10,000/- to $32,000/- per acre an increase of 220%. These increases are thus the clearest recognition by the Government itself that there has been a very sharp and steady increase in prices contrary to what D.W.4 said, even after 1974 and this seemed quite prominent from 1974 to 1977. The following defects must however be noticed regarding these four lots as comparables. 6602, 6603, 6604 and 1252 relatively, are in a different locality altogether, being at Kulai New Village whereas the subject lot is at Kulai Besar. They appear to be about 2 miles from one another. This may be gauged by P.W.6's evidence that the subject lot to Lot 6017 is about half a mile. The distance may appear to be insignificant in a lesser developed area but where the witness himself says in his report and in evidence that the Kulai area is fast developing the distance of two miles or so may have a sharp bearing on prices depending on where the centre of activity is in relation to the one or the other. That is only common logic. Again, the four lots mentioned are at some distance from the main road. They appear to be about half a mile away whereas the subject property is fronting the Johor Bahru-Kuala Lumpur road. Whatever potentiality these four lots have, could hardly compare with a lot on the main road. Indeed, according to D.W.4 land fronting the main road is superior in respect of commercial element, although in respect of residential aspect, he would prefer the comparisons at Khet Loong (that is the 4 lots). He also agreed that the land with frontage to the main road would enjoy better price than at the rear (that is away from the main road). The subject lot is nearer to Johor Bahru and the Senai Airport by their relative positions which again makes it a much superior land. In the light of these factors in favour of the subject land, the four lots could hardly be compared. Lot 3625 had been cited as another comparable, but this land is even further away from the subject land than the four lots by it seems a mile. It is also more than twice the size of the subject land. It is an accepted

fact in valuation that lands tend to be valued less as they become bigger in size. Thus as one can see there is no sale within the immediate vicinity of the subject land which could safely be used to reflect its true value. That the subject lot had building potentiality seems acknowledged by both sides. The very fact that the land was used later to build houses on it only confirmed that fact. There was no question also that the owner could have easily converted and sub-divided the land as borne out by D.W.4's testimony. He said Lot 6024 adjoining the subject lot had shop-houses at the front. He was of the view that if land on either side were developed land it would not be difficult to get the approval for conversion and sub-division irrespective of whether it was in the Town Council area or not. It seems in fact that D.W.4 had accepted everything regarding the distinct superiority of Lot 6025 except giving it the extra value which it deserved. Perhaps, as I said he was somewhat in a dilemma to have to reconcile his latter position with the earlier one. But I think there is no question that even if all things were equal, Lot 6025 is definitely far superior to the five lots cited by D.W.4 but which fact unfortunately he had not given sufficient recognition to. That in itself, quite apart from the general increase in prices, should have been given extra credit by D.W.4 over and above the other lots. An admission for instance of the vast superiority of Lot 6025 is the evidence by him earlier, that the latter is superior in commercial element, although in respect of residential aspect he would prefer the residential lots (i.e. the four lots). I think no one will quarrel with that line of reasoning, but surely when it comes to dollars and cents it must mean that the subject lot is more valuable per acre than the four strictly residential lots. But evidently he had not considered this aspect of the four lots when comparing them with the subject lot. At least I cannot find anywhere that he had distinctly emphasised this point. The plaintiff called two valuers, P.W.3 and P.W.6 to give evidence of value as on July 1975. P.W. 3 said that he valued the land at $4.50 per sq. ft. and the house at $126,000/–. P.W.6 valued the land at $3/– per sq. ft. and the house at $48,000/–. The plaintiff's valuers were quite distinct in one respect and that is that they had not cited any comparables, but quite obviously, from what I had earlier said, that if they did not do so, it was apparent, because there were no sales directly comparable to the subject lot. P.W.3 based his evidence of value essentially on the offer made to him by some developers. In *Pribu* v. *The Secretary of State*[2] it was held that "evidence of such offers were certainly admissible and could be of value if there were firm offers supported by the testimony of reliable witnesses or documentary evidence". It was open to the defendant to challenge P.W.3 as to the truth of the offer. One simple way to do so was to put it to him that the assertion was not true, as would have required him to substantiate his assertion. At least he should be asked whether P.W.3 was calling anyone. Quite understandably if asked to produce them, their evidence may be awkwardly prejudicial if not detrimental to the defendant. This may explain the defendant's stand, or else because the figure quoted was acknowledged to be of general acceptance. The fact that a witness had testified to a fact, which was not challenged, does not make him unreliable. P.W.3 was asked merely how he arrived at the figure of $4.50 per sq. ft. to which the answer was, in 5 acres, 20 terraced-houses could be built and each could be sold at $20,000/– to $30,000/–. He said that one could also build shop-houses at the front and in 1975 each would sell for about $75,000/–. He did not deny the fact that he had to set aside for roads, drains and open spaces. He was also aware that there was a Government ruling that 40% of the sub-divided areas must be set aside for low-cost houses where each could not be sold for more than $15,000/–. No question was however asked as to how he arrived at the $126,000/– for the house, seemingly thus again accepting the figure. The $4.50 per sq. ft. was his value for the land after conversion and sub-division. P.W.6 on the other hand based his value at $3.00 per sq. ft., essentially on the valuation which he made on March 29, 1975 on Lot 6017 which was 8 lots away. There were 32 units of terraced and shop-houses, 20 units were for shop-houses. At the time he made the valuation, there was no requirement for setting aside for low-cost. He valued the shop-houses at $15/– per sq. ft. and $4/– per sq. ft. for the terraced-houses. The area of the shop lot was 2,070 sq. ft. The area for Lot 6017 was 4 acres 3 roods and 37 poles which was slightly smaller than the subject land. The owner was Tai Kuey Enterprises Sdn. Bhd. The defendant did not ask for what purpose the land was valued and whether the valuation was accepted. It is safe to assume, as is normally the case, for the purpose of getting some credit facilities from some financial body or other and was accepted. Again, this must be the necessary inference, if the defendant chose not to question the witness. I do not see why he should be asked to value the land, otherwise. P.W.6's valuation on Lot 6017 by itself should thus be *prima facie* evidence of value, because if lands are valued for the purpose of stamp duty and also for the purpose of land

acquisitions by Government Valuers and are normally accepted by the Collectors and by the court alike as *prima facie* evidence of market value, I do not see why in cases where valuations are made by private valuers for the purpose of some financial institutions and are seen to be accepted by them that that in itself should not also *prima facie* be some evidence of value, when both are subject to statutory check and restraint. It seems difficult for me, besides, to see the logic of the defendant's refusal to accept P.W.6's valuation when in 1972, he valued the same land and like his 2nd. report, had also cited no comparable. What is more absurd to me is that whereas they accepted P.W.6's value of the land at $210,000/- in 1972, that 3½ years later in 1975, they valued the land at $185,000/-, $35,000/- less, and what was worse, against their own valuer's valuation, that it was worth $230,000/- which is clearly shown to be more by $35,000/- than theirs! I wonder which part of the country had shown land prices steadily going down instead of going up as was suggested by the defendant. The $3/- per sq. ft. does not appear to be wholly unreasonable and unrealistic. P.W.6 had valued the shop-lots at $15/- per sq. ft. and the terraced-houses at $4/- per sq. ft. The average value of the land per sq. ft. was therefore $8/- per sq. ft. Deducting 40% from it for the low-cost, the land value per sq. ft. would thus be about $4.80 per sq. ft. P.W.6's figures therefore more or less tally with P.W. 3 at $4.50 per sq. ft. If their values are without substance, it is a strange coincidence that they both happen to be about the same, in their figures. What D.W.4 had to say besides, seemed to support merely the consistency of P.W.3 and P.W.6's figures being fairly reliable and true. D.W.4 said that the development of Kulai was apparent in 1972 – 1973 and it was gathering momentum in the succeeding years, modifying substantially in effect his own report that "property values have reached their peak around the end of 1973 and early 1974 with the property market providing for general stabilization, thereafter." He made the qualification, however, that market reaction would not have been consistent with the development pace because of fiscal constraint made to lie by Government, which affected the price, for example, the Land Speculation Act. But if there was any statutory restraint it would, in my humble view, only have been minimal because surely the curb was, if at all not on development but on the amount of the gain to be reaped, at least that must be the intention, if not the effect of the law. Because the right of the public to borrow till lately, any rate, for any amount from financial houses had been, as far as everyone knows, quite unrestricted. And the right of the individual to own houses, again till lately, had also been unlimited and unhindered. Logically, the Government legislation should act, instead to induce people particularly developers to invest more in land so as to increase their turn-over of profit, to make up for what they would otherwise have gained. The rate of development would therefore continue at the same, if not greater pace, followed by a corresponding market reaction but of course at a slightly reduced acreage annual rate of increase. That must be the necessary economic picture because the National Economy must necessarily generate growth to bring in the prosperity with a fair balance maintained between healthy development and inflation which is the opposite of an uncontrolled economic growth. However, it seems rather surprising to me, if D.W.4 was right, that despite the imposition of the Land Speculation Act and other fiscal measures that Government Valuers themselves felt that there should be an increase in value in Kulai alone from 74% in 1973 to 220% in 1977. That does not seem to support D.W.4's argument that land prices had been checked because of the fiscal restraint. It seems to be completely the other way round as I had suggested. In my view considering what has been said, the value of the subject land at $1.70 per sq. ft. in July 1975 would not be unreasonable, which would be about $74,000/- per acre. On the $1.70 per sq. ft. should be added such sums as would reflect, as earlier stated, the necessary increase in price between 1975 and the date of judgment, that is July 1982, a period of 7 years. In my view it has become a matter of public and common knowledge that even if there was no boom in prices, the normal annual rate of increase of land prices has always been generally about 20% a year. This seems to be confirmed by the 700 or so land reference cases that came before me for the last 11 months or so throughout West Malaysia. There would thus be an increase of 140% over the years from 1975 – 1982 to the value of the land. One must also remember in valuing lands that it is common knowledge that the public by and large do not always declare the true consideration for their transactions, so as to avoid being subjected to the statutory levies earlier cited, more than they would want to, and in considering the record of sales in the Land Office quoted by valuers, the court must always give some allowance for this fact. To the value of the land must be added the cost of the house. That must necessarily be the cost of reinstating the house in 1975. In my view there is no double counting here because the plaintiff has lost her house and her land. Giving the value for both is

not necessarily contradictory because even in land acquisition cases, the house is separately compensated for simply because, I think the land use of agriculture land can only be *estimated* not *exact*. Besides, as recalled earlier, if the test of reasonableness is to be applied, then it should be held more in favour of the plaintiff, because she has lost her house and her land against her will. P.W.3 valued the house at $120,000/–; P.W.6 valued it at $48,000/–. As I said, no question was asked by the defendant as to how they arrived at these figures. I think an average figure of $84,000/– would in the circumstances be fair.

It had also been said that the amount of $212,000/– should be deducted from whatever was due to the plaintiff because she had received them, but as I stated in my judgment, these sums were not paid pursuant to P.30, so they could not rightly be set off against the amount due to her. The $92,000/– was not, first of all, paid to C.K.B. by the 2nd. defendant as it should have been, but by the first defendant. And it was paid by the defendant because that was the only means by which the land could have been discharged and eventually transferred to them. As to the $120,000/– paid to H.K.B., it was again not paid by the 2nd. defendant, as it should have been, but again by the 1st. defendant and it was paid to H.K.B. strictly under his guarantee to H.K.B. for Dr. Dass' overdraft. These sums were, besides, paid pursuant to and arising from a fraud. Under Section 65 of the Contract Act it clearly does not allow the defendant to recover them. *Pollock & Mulla* (9th. Edition, Page 463) says:–

"It seems on the whole that the present section (section 65) does not apply to agreements which are void under section 24 by reason of an unlawful consideration or object and still less to those which are tainted with fraud or moral turpitude and there being no other section in the Act under which money paid for an unlawful purpose may be recovered back, the analogy of the English law will be the best guide."

And as clearly stated in *Palaniappa Chettiar* v. *Arunasalam Chettiar*[3] the process of the court cannot be used by the plaintiff to achieve a fraudulent purpose and also get the plaintiff's property back where it had been transferred to the defendant in order to defeat the law.

That leaves me therefore with the last item of damages. It had been urged by the plaintiff that it is only right and proper that in this case the defendant be asked to pay in addition to compensatory, exemplary damages. *Mcgregor* on Damages (Pg. 219) says that the primary object of an award of damages is to compensate the plaintiff for the harm done to him; a possible secondary object is to punish the defendant for his conduct in inflicting that harm; such a secondary object can be achieved by awarding, in addition to the normal compensatory damages, damages which are variously called exemplary damages, punitive damages, vindictive damages, even retributory damages, and comes into play whenever the defendant's conduct is sufficiently outrageous to merit punishment, as where it discloses malice, fraud, cruelty, insolence or the like. It is however said by Lord Hailsham in *Broome* v. *Cassell & Co.*[4] that the principle of exemplary damages does not extend to the tort of deceit, disagreeing with the *dictum* of Widgery L.J. *in Mafo* v. *Adams*[5] that Lord Devlin's analysis of the principle laid down in *Rookes* v. *Barnard*[6] was wide enough to allow it to be extended to cases hitherto not included in the category of exemplary damages like deceit. Lord Hailsham said the explanation in this lay in the close connection the action had with the breach of contract. Lord Denning however in *Drane* v. *Evangelou*[7] seemed clear on the contrary to regard the category of cases for which exemplary damages may be awarded as not closed and he cited Lord Devlin's passage in *Rookes* v. *Barnard* to support his view where the latter said –

"This category is not confined to money-making in the strict sense. It extends to cases in which the defendant is seeking to gain at the expense of the plaintiff some object – perhaps some property which he covets – which either he could not obtain at all or not obtain except at a price greater than he wants to put down. Exemplary damages can properly be awarded whenever it is necessary to teach a wrong doer that tort does not pay."

In that case the plaintiff was awarded exemplary damages for unlawful eviction of a tenant, an action somewhat contractual in nature. I am however bound by the decision in *Broome* v. *Cassell & Co.* above (although it seems *obiter*) because Lord Hailsham said:

"It is true, of course, that actions for deceit could well come within the purview of the second category" (i.e. that the defendant's conduct had been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff – that nevertheless he said:–) "I can see no reason for thinking that Lord Devlin intended to extend the category to deceit."

In the circumstances I would disallow the plaintiff's claim for exemplary damages. If, however, I am found to be wrong then I would award a sum of $20,000/– for the same. I think that is a fair and reasonable amount considering the circumstances.

The plaintiff had been subjected to great mental pain, agony and humiliation as a result of the defendant's outrageous conduct. I would only quote Lawton L.J. in *Drane* v. *Evangelou* in this respect where he said:

"To deprive a man of a roof over his head in my judgment is one of the worst torts which can be committed. It causes stress, worry and anxiety. It brings the law into disrepute if people like the defendant can act with impunity in the way he did."

To the defendant's contention that the plaintiff cannot claim under this head because the damages will by definition exceed the profit, it must simply be said that on principle, the only essential criterion is whether the defendant's conduct is *calculated* to result in profit (the emphasis is mine). As Lord Devlin in *Rookes* v. *Barnard* said:

"Where a defendant with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrong doing will *probably* exceed the damages at risk, it is necessary for the law to show that it cannot be broken *with impunity.*" (the emphasis is mine).

As regards the principle of award of damages, the authorities are somewhat uncertain as to whether there should be separate award for each item of damages where the plaintiff had succeeded in the separate causes of action united in the same suit as in this case. *Mcgregor 14th. Edition Page 1031* citing *Barber* v. *Pigden*[8] is of the view that the court should either make a separate award but a single award will not be upset in the absence of prejudice or, a court has a discretion to make a single award but should make a separate award if a single award could lead to prejudice.

The 1st., 2nd. and 3rd. defendants shall be jointly and severally liable for the tort of deceit, but the 1st. and 2nd. defendants shall be jointly and severally liable for the breach of contract. The 2nd. defendant says that he is not personally liable for any damage because I had found that he was merely an agent of the 1st defendant. But, as the evidence showed, the 2nd. defendant had never disclosed that he was acting for the 1st. defendant, his principal, and under section 183 of the Contract Act, he is in that event, presumed to be personally liable on the contract. *Pollock & Mulla* (at Page 772, 9th. Edition) says:

"It is settled that an agent cannot claim indemnity in respect of acts which he knows to be unlawful, even if they are not criminal whether on an express or implied promise. Any such promise is void as being contrary to public policy."

And finally, section 186 says:

"In cases where an agent is personally liable a person dealing with him may hold either him or his principal or both of them liable."

Quite apart from the above principles, it is abundantly clear that the 1st. defendant was present when the 2nd. acted as his agent to commit fraud on the plaintiff, which thus makes him also liable, on the facts, jointly with the 2nd. defendant.

I would therefore in the circumstances award a sum of $973,000/– as general damages to the plaintiff with costs to be taxed. As I said earlier this sum represents the award for the tort of deceit only, but having considered the other claims, it would necessarily also cover them, if need be. This sum, as has already been stated, does not include the amount for exemplary damages. There shall be an award of interest as suggested by the defendants at 6% per annum on the $370,260/– (the price at July 1975) from 1975 till July 1982 and at 3% per annum on the Judgment sum from the date hereof till realization.

Claim allowed.

Solicitors: *Subra Naicker & Co., Allen & Gledhill; Shearn, Delamore & Co.*

SHARIFAH ASIAH v. ABDUL RAHMAN BIN LONG & ANOR.

[O.C.J. (Siti Norma Yaakob J.) May 11, 1983]
[Kuala Lumpur – Civil Suit No. 898 of 1977]

Damages – Quantum – Fracture of pubic and pelvic bones, 1/2" shortening of hip, injury to vagina; loss of one genital organ – General damages allowed at $30,000.

The plaintiff, a 15 year old student, claimed against the defendants for injuries sustained by her as a result of the accident for which the defendants conceded 100% liability. The plaintiff suffered the following injuries:

(1) fracture of her superior and inferior pubic bones which has since united but have left 1/2" shortening of her right hip. However, this shortening had in no way affected her gait. She walked normally and she had no difficulty in squatting down;

(2) fracture of the left acetabulum which had united;

(3) tear in the posterior vaginal wall which had left her without her hymen and her vagina badly scarred.